

1 KEKER & VAN NEST LLP  
ROBERT A. VAN NEST - # 84065  
2 rvannest@kvn.com  
CHRISTA M. ANDERSON - # 184325  
3 canderson@kvn.com  
DANIEL PURCELL - # 191424  
4 dpurcell@kvn.com  
633 Battery Street  
5 San Francisco, CA 94111-1809  
Telephone: 415 391 5400  
6 Facsimile: 415 397 7188

7 KING & SPALDING LLP  
BRUCE W. BABER (pro hac vice)  
8 bbaber@kslaw.com  
1185 Avenue of the Americas  
9 New York, NY 10036  
Telephone: 212 556 2100  
10 Facsimile: 212 556 2222

11 Attorneys for Defendant GOOGLE INC.

12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA

14 SAN FRANCISCO DIVISION

15 ORACLE AMERICA, INC.,

16 Plaintiffs,

17 v.

18 GOOGLE INC.,

19 Defendant.

Case No. 3:10-cv-03561 WHA

**GOOGLE INC.'S REPLY IN SUPPORT  
OF MOTION TO STRIKE PORTIONS OF  
EXPERT REPORT AND TESTIMONY OF  
DR. JAMES R. KEARL**

Date: April 27, 2016  
Time: 8:00 a.m.  
Dept.: Courtroom 8, 19th Fl.  
Judge: Hon. Hon. William Alsup

## I. INTRODUCTION

As detailed in its Motion to Strike, ECF 1583-3, Google submits that certain of Dr. Kearl's opinions do not meet a fundamental standard for admissibility—namely, that they be based on “facts or data in the case that the expert has been made aware of or personally observed,” Fed. R. Evid. 703. Google appreciates the difficult task before Dr. Kearl and respects the challenges he faces in his role as a court-appointed expert in this litigation. Google believes, however, that his independence should not erode the requirement that all of his opinions have a sound factual basis and be supported by relevant literature as appropriate before they are submitted to the jury. Anything less will not aid the factfinder and requires exclusion. *See, e.g., Feduniak v. Old Republic Nat'l Title Co.*, No. 13-CV-02060-BLF, 2015 WL 1969369, at \*4 (N.D. Cal. May 1, 2015) (excluding testimony under *Daubert* where expert applied methodology based on “assumptions for which he did not have sufficient rational bases”); *Palmisano v. Olin Corp.*, No. C-03-01607 RMW, 2005 WL 6777561, at \*5 (N.D. Cal. July 5, 2005) (excluding testimony under *Daubert* where the expert “provide[d] little support for [the factual] premise” of his opinion and the facts in the record actually contradicted the premise); *see also Daubert v. Merrell Dow Pharm, Inc.*, 509 U.S. 579, 591 (1993) (proffered expert testimony should “aid the jury in resolving a factual dispute”).

Google moved to strike three opinions of Dr. Kearl, in large part because they take Oracle's damages theories at face value even though those theories are not supported by competent evidence and are contradicted by market facts and economic studies in the record. Dr. Kearl's Response to Google's Motion to Strike, ECF 1622-3, does nothing to alter Google's analysis or provide additional support for these challenged opinions. Google's Motion to Strike, therefore, should be granted.

## II. ARGUMENT

### A. The Court should strike Dr. Kearl's opinions relying on the previously-stricken opinions of Drs. Shugan and Cockburn, who are neither witnesses nor designated as experts in this re-trial.

As discussed in Google's Motion to Strike (“Motion”), Dr. Kearl's “middle range” opinion relies in significant part on a conjoint study by Oracle's former expert, Dr. Steven

1 Shugan, that this Court held was “an unreliable predictor of market share.” ECF 785 at 14. The  
 2 Court ordered that “the conjoint analysis’ determination of market share is STRICKEN.” *Id.* at  
 3 16. Despite this, Dr. Kearl premises some of his opinions here on that unreliable Shugan  
 4 analysis, and on the opinions of another former Oracle expert, Dr. Iain Cockburn, who had relied  
 5 on the stricken conjoint analysis. The Court similarly struck Dr. Cockburn’s opinions. *Id.* at 18.

6 Dr. Kearl forthrightly acknowledged in his report that reliance on these former Oracle  
 7 experts may be improper given that “portions of the expert opinions in the previous litigation  
 8 were ruled inadmissible by the Court.” ECF 1583-6 (Kearl report) at n.105. And, in response to  
 9 Google’s Motion to strike his opinions that are premised on the stricken conjoint analysis, Dr.  
 10 Kearl similarly responds by stating that “if [his] reliance on those analyses is improper, [his]  
 11 discussion and opinions expressed in that section should be stricken.” ECF 1622-3 (Response of  
 12 Kearl) at 3. Accordingly, and for all the reasons discussed in Google’s Motion, Dr. Kearl’s  
 13 opinions premised on expert analysis that this Court previously ruled as inadmissible should be  
 14 stricken. *See* ECF 1583-3 (Mtn. to Strike) at 7-10.

15 **B. Dr. Kearl’s modification of Dr. Leonard’s counterfactual model is not**  
 16 **supported by the facts or the literature.**

17 Google challenged Dr. Kearl’s modification of the model used by its expert, Dr. Gregory  
 18 Leonard, which in turn applied economic analysis to Oracle’s speculative damages theory that  
 19 Android would have reduced market share if there had been fewer apps available on the platform.  
 20 *See id.* at 10-12. Even though Oracle’s theory is not supported by the facts or economic literature  
 21 in the record, and is disproven by what actually occurred with regard to app availability in the  
 22 years after Android was released, Dr. Leonard nevertheless performed a counterfactual analysis to  
 23 test the impact of fewer apps on Android profits if, *arguendo*, Oracle’s theory was right. In so  
 24 doing, Dr. Leonard applied an economic model that is supported in the literature and found that  
 25 because so many key apps would have been developed for Android whether or not Android had  
 26 used the accused declarations/SSO (or even the Java language), even if Oracle’s theory were  
 27 correct (and it is not), the amount of infringers’ profits would be relatively small—and not reach  
 28 into the billions as Oracle asserts.

1 Dr. Kearl adapted Dr. Leonard's model and ran several scenarios in which he excluded  
 2 certain apps from Dr. Leonard's app inclusion criteria. However, Dr. Kearl did this without  
 3 regard to the popularity or significance of the app removed. For example, under Dr. Kearl's  
 4 scenario #3, apps like Facebook, Walmart, Yahoo and Skype would not have been developed for  
 5 Android. ECF 1619-5 (Leonard Reply to Kearl Rpt.) at ¶26. But the evidence shows that  
 6 developers use multiple platforms, know multiple languages, and can port apps from one platform  
 7 to another at low cost. *Id.* Against this economic reality, it is inconceivable that companies like  
 8 Facebook, which unquestionably have the resources and a strong financial incentive to create  
 9 apps for popular platforms, would not have created an app for Android. Google, therefore,  
 10 moved to strike these opinions.

11 In response to Google's motion to strike, Dr. Kearl admits that Dr. Leonard's approach is  
 12 "plausible" but counters that it is "not clearly obvious." ECF 1622-3 (Kearl Response) at 5. He  
 13 does not, however, cite to any countervailing economic literature that calls Dr. Leonard's model  
 14 into question. He also does not address the real-world economic studies in the record that  
 15 conclude that application developers move to a platform only after it has a proven, sustainable  
 16 user base. *See* ECF 1583-3 (Mtn. to Strike) at 10; ECF 1584-11 and 1584-12 (Karwande Decl.  
 17 Exs. 10 and 11). And, he does not confront the evidence demonstrating that, in the real world,  
 18 there were very few Android applications until after the first successful Android phones were  
 19 released in late 2009 (with only a few applications) and finally attracted a large number of users.  
 20 *See* ECF 1583-16 (Leonard Rpt., Corrected 3/10/2016) at ¶¶163-164 and evidence cited therein.

21 Dr. Kearl's critique of Dr. Leonard's analysis, therefore, is unsupported by economic  
 22 literature and not reasonably based on the evidence in the case. Dr. Kearl's opinions based on  
 23 implausible assumptions, therefore, should be stricken.

24 **C. Dr. Kearl's "No Android" counterfactual is not supported by the facts.**

25 Google moved to strike Dr. Kearl's hypothetical in which, in the words of his March 18  
 26 Report, "the next best non-infringing alternative is 'no Android.'" ECF 1583-6 (Kearl Rpt.) at  
 27 ¶79. In other words, a scenario in which Google did "not pursue the Android project at all." *Id.*  
 28 at ¶77. Google challenged this counterfactual for two reasons. First, there is not sufficient

1 evidentiary support for this alternate reality, and, second, Dr. Kearl performs no apportionment  
 2 analysis under this scenario to determine what portion of Android's profits have an actual causal  
 3 nexus to the declarations/SSO of the 37 Java SE APIs. *See* ECF 1583-3 (Mtn. to Strike) at 12-14.

4 Dr. Kearl responds to Google's challenge by stating that Oracle's experts have "take[n]  
 5 the position that absent infringement Android would either not have been developed or would  
 6 have been a complete market failure." ECF 1622-3 (Kearl response at 7). While it is true Oracle  
 7 expert Adam Jaffe speculated at deposition that "Android as we know it" would not have existed  
 8 without the declarations/SSO of the 37 Java SE API's, and Oracle expert James Malackowski  
 9 theorized in written submissions that there were "no commercially acceptable alternatives  
 10 available to Google" other than using the declarations/SSO of the 37 Java SE APIs, this does not  
 11 mean that a "no Android" counterfactual is sufficiently supported by evidence to permit an expert  
 12 to present a multi-billion dollar theory to the jury—especially when the theory seeks indirect  
 13 profits. *See, e.g., Mackie v. Rieser*, 296 F.3d 909, 915 (9th Cir. 2002) ("a district court must  
 14 conduct a threshold inquiry into whether there is a legally sufficient causal link between the  
 15 infringement and subsequent indirect profits"); *Feduniak*, 2015 WL 1969369, at \*4 (excluding  
 16 testimony under *Daubert* where expert applied methodology based on "assumptions for which he  
 17 did not have sufficient rational bases"). Here, even Oracle's chief damages expert, Mr.  
 18 Malackowski, had to admit at deposition that Google would have launched a smartphone platform  
 19 of some sort even without the allegedly-infringed material. *See* ECF 1583-3 (Mtn. to Strike) at  
 20 13 (quoting Malackowski deposition testimony); ECF 1583-8 at 377:20-378:1 (Malackowski  
 21 testimony). Dr. Kearl's "No Android" counterfactual opinion lacks necessary support and should  
 22 be stricken. *Palmisano*, 2005 WL 6777561, at \*5 (excluding testimony under *Daubert* where the  
 23 expert "provide[d] little support for [the factual] premise" of his opinion and the facts in the  
 24 record actually contradicted the premise).

25 Finally, Dr. Kearl does not respond at all to Google's motion to strike the "No Android"  
 26 opinions because they fail to apportion Google's Android-related profits between the infringing  
 27 activity—*i.e.*, use of the declarations/SSO of the APIs—and all the other valuable components of  
 28 the platform. *See* ECF 1583-3 (Mtn. to Strike). On that uncontroverted basis alone, Dr. Kearl's

1 opinions concerning a “No Android” counterfactual must be struck. *See, Polar Bear Prods., Inc.*  
 2 *v. Timex Corp.*, 384 F.3d 700, 712 (9th Cir. 2004) (recognizing “the impropriety of awarding  
 3 [plaintiff] all of [defendant’s] profits on a record that reflects beyond argument that most of the  
 4 these profits were attributable to elements other than the infringement.”) (internal citation  
 5 omitted); *Cream Records, Inc. v. Jos. Schlitz Brewing Co.*, 754 F.2d 826, 828-29 (9th Cir. 1985)  
 6 (“where it is clear, as it is in this case, that not all of the profits are attributable to the infringing  
 7 material, the copyright owner is not entitled to recover all of those profits merely because the  
 8 infringer fails to establish with certainty the portion attributable to the non-infringing elements”).

### 9 **III. CONCLUSION**

10 For the foregoing reasons, and those set forth in the moving papers, the Court should grant  
 11 Google’s Motion to Strike Portions of Dr. Kearl’s Expert Report and strike Dr. Kearl’s opinions  
 12 set forth at ¶¶ 9,11,70,71,72,73,77,78,79,103 of his report.

14 Dated: April 13, 2016.

KEKER & VAN NEST LLP

16 By: s/ Robert A. Van Nest  
 17 ROBERT A. VAN NEST  
 18 CHRISTA M. ANDERSON  
 19 DANIEL PURCELL

Attorneys for Defendant GOOGLE INC.